



Employment Court of New Zealand

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TPT Forests Limited v Penfold [2022] NZEmpC 236 (19 December 2022)

Last Updated: 22 December 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 236](#)

EMPC 5/2022

IN THE MATTER OF proceedings removed from the Employment

Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure BETWEEN TPT FORESTS LIMITED

First Plaintiff

AND TPT GROUP LIMITED

Second Plaintiff

AND CRAIG PENFOLD

First Defendant

AND SIMON STRONGE

Second Defendant

Hearing: 11 October 2022 (Heard at Auckland)

Appearances: P Skelton KC and T Nelson, counsel for plaintiffs

S W B Foote KC and T Refoy-Butler, counsel for first defendant S Langton, counsel for second defendant

Judgment: 19 December 2022

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Challenge to objection to disclosure)

[1] The plaintiffs (TPT) have brought proceedings against the defendants alleging that they have acted in breach of their employment obligations to TPT, causing TPT loss and damage. TPT seeks declarations, damages, and compliance orders. The proceedings are strongly defended.

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[2] It is anticipated that approaches the defendants made to Manulife Investment Management (formerly Hancock Natural Resource Group Inc) (Manulife) will be a focus of the proceedings. Manulife is the agent for client entities that had log marketing sales agency agreements with TPT entities. The defendants say that breaches of those

agreements have caused those Manulife client entities to suffer financial loss.

[3] The plaintiffs have sought disclosure of documents and the defendants have objected to the disclosure of some of those documents. The plaintiffs challenge certain objections. This judgment resolves the plaintiffs' challenge.

The issues have been narrowed

[4] When the challenges to the objections were filed, there were quite a number of documents in issue. The grounds for the defendants' objections were common interest privilege, public interest privilege, litigation privilege, solicitor/client privilege and without prejudice privilege.

[5] In submissions made at the commencement of the hearing, the plaintiffs sought orders:

(a) declaring the defendants' objections to disclosure ill-founded insofar as they relate to:

(i) PEN.01217; PEN.01225; PEN.01826; PEN.01859; PEN.01945-1947;

(ii) SS.02194; SS.02195; SS.02202; SS.02456; SS.02457; SS.02562; SS.03107; SS.03114;

(iii) any documents listed as privileged by the First Defendant that comprise amended versions of TPT's documents;

(b) ordering the disclosure of those documents (including in redacted form, where appropriate) and (on a counsel only basis) in relation to the

documents for which public interest privilege had been claimed, be made by the defendants within 10 working days; and

(c) reserving leave to the plaintiffs to apply, in relation to the documents provided on a counsel only basis, for further orders should the need arise to use the documents to: (i) take instructions; (ii) brief lay or expert witnesses; or (iii) otherwise for the purpose of this litigation.

[6] By the time the hearing concluded, the issues were narrowed considerably, and several agreements were reached.

[7] It transpired that the documents listed in (a)(i) had been supplied so no orders were required.

[8] Certain documents included details of Chinese witnesses who, it is said, had made disclosures on the condition of anonymity and confidentiality. The defendants had initially claimed public interest privilege for these. As it transpired, the defendants proposed to disclose these documents with the identifying details of those witnesses redacted from the copies provided to the plaintiffs. Unredacted copies of documents in this category then would be disclosed on a counsel-only basis and subject to undertakings to maintain the confidentiality of the witnesses' identity. The parties agreed on this arrangement, subject to leave being reserved to the plaintiffs to apply within 10 working days of the Court order, for further orders should they consider the need arises to use the documents to: (i) take instructions; (ii) brief lay or expert witnesses; or (iii) otherwise for the purpose of this litigation.

[9] The parties agreed that the documents in (a)(iii) would be provided, but with any comments and other notations redacted.

[10] The documents listed in (a)(ii) comprise documents that the defendants had said attracted litigation privilege held by Manulife for anticipated proceedings against TPT entities.

[11] The plaintiffs have agreed that documents created from 17 May 2019, New Zealand time, (the date of the defendants' approach to Manulife) are legitimately withheld but say that documents that pre-date 17 May 2019 should be disclosed.

[12] The defendants generally agreed with that stance, but two of the identified documents remained in issue, being the second defendants' documents SS.02456 and SS.02457. These documents are described as TPT documents that have been amended for the purpose of Manulife's investigation into the plaintiffs (and the plaintiffs' related entities) over which Manulife asserts litigation privilege.

[13] The original, unamended version of these documents is document SS.02193, overlaid with active customer lists. Document SS.02193 has been disclosed.

[14] Although it was suggested that documents SS.02456 and SS.02457 had been last modified after 17 May 2019, the metadata that was included in an attachment to Mr Stronge's affidavit showed last modification dates of 18 and 19 March 2019.

[15] By memorandum dated 25 October 2022, filed after the hearing, Mr Langton, counsel for Mr Stronge, confirmed the metadata information was correct, and that litigation privilege was no longer asserted in respect of those two documents. Mr Stronge, however, maintained that the two documents are subject to common interest privilege, relying on the oral argument advanced at the hearing.

[16] At the hearing, Mr Langton argued that common interest attached to the documents, and/or that disclosure of the documents would be injurious to the public interest, and therefore that the documents may be withheld.¹

The public interest argument fails

[17] As the public interest argument was not referred to in Mr Langton's memorandum of 25 October 2022, it is not clear whether it is being pursued. It is dealt with, nevertheless.

¹ [Employment Court Regulations 2000](#), reg 44(3)(c).

[18] The argument is that the defendants' disclosures were in the nature of whistleblowing, as they were passing on to Manulife information on what they perceived to be wrongdoing by the TPT entities.

[19] I do not accept that the public interest requires protection of documents sent by an employee to the agent of their employer's customers. There is, of course, legislation in place dealing with whistleblowing in New Zealand, but that would not apply to what the defendants did. This argument fails.

Common interest does not apply

[20] For there to be a common interest privilege, the alleged common interest must be either identical or so closely related as to make it inappropriate to treat the parties claiming privilege separately. In making an assessment, the Court is cognisant of the fact that protection of documents by privilege is an encroachment on the fundamental right of the opposing party in litigation to have access to all relevant documents in the possession or under the control of the party claiming privilege. The onus of establishing the existence of the privilege is a heavy one and rests on the party claiming it.²

[21] I do not accept that the interest between Manulife (as an agent of clients of TPT) and the defendants (as former employees of TPT) meets that test.

[22] The challenge to the second defendant's objection to disclosure in respect of documents SS.02456 and SS.02457 succeeds. Those documents are to be produced.

Communications said to be without prejudice

[23] There is a further category of documents that the second defendant objects to producing. This comprises three documents that have been listed as being without prejudice communications (SS.03102, SS.03105 and SS.03286).

[24] The first two documents are draft without prejudice communications that were prepared by Denali Timber Management (Denali), an Alaskan company, apparently

² *Unilateral Investments Ltd v VNZ Acquisitions Ltd* [1992] NZHC 2863; [1993] 1 NZLR 468 (HC) at 478.

with the intention of trying to settle a dispute that arose between Denali and TPT. Mr Stronge is in possession of the drafts and says they are relevant to this case.

[25] Mr Stronge accepts that the drafts do not fall within without prejudice communications, as that term is used in the [Evidence Act 2006](#), as they were not sent.³ He submits that, nevertheless, privilege must attach to the drafts as it would be perverse otherwise. He says litigation privilege applies, being Denali's privilege, which Mr Stronge must assert.

[26] The difficulty with that submission is the lack of evidence of Denali's intentions or its position with respect to possible litigation. In particular, there is no evidence of there being any actual or anticipated litigation between Denali and TPT. Without evidence from Denali, in particular on this point, the second defendant's objection is not accepted.

[27] The challenge to the second defendant's objection to disclosure in respect of documents SS.03102 and SS.03105 succeeds. Those documents are to be produced.

[28] The third document is a settlement offer advanced in the course of other court proceedings brought by Denali, in which Mr Stronge is one of the defendants. It seems TPT is not involved in these proceedings. Again, it is listed by Mr Stronge as a relevant document.

[29] The plaintiffs acknowledge that, applying [s 57\(1\)](#) of the [Evidence Act](#), the document would be privileged in the hands of the sender and the recipient. Although the [Evidence Act](#) does not apply to the Employment Court, the Employment Court accepts that without prejudice communications between parties to a dispute should generally be protected. If document SS.03286 was a without prejudice communication between the parties to these proceedings, the issue would be unlikely to arise on disclosure, as both parties would have the document. The document would, however, almost certainly be inadmissible, consistent with the policy rationale that parties should be able to try to resolve differences between them, secure in the

3 [Evidence Act 2006, s 57\(1\)](#).

knowledge that any admissions in the course of such communications are not before the Court if and when the Court deals with the substantive matter.⁴

[30] The plaintiffs rely on [s 57\(3\)\(d\)](#) of the [Evidence Act](#). They say that, in the interests of justice, the need for the document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations. They submit further that the Court should admit the document pursuant to [s 189\(2\)](#) of the [Employment Relations Act 2000](#), as a matter of equity and good conscience.

[31] I am not satisfied that is the case here. [Section 57\(3\)\(d\)](#) applied from the beginning of 2017.⁵ It was intended to pick up the common law exceptions to without prejudice privilege, which include: 6

- (a) where the issue is whether the communications resulted in a settlement agreement;
- (b) to show that a settlement agreement should be set aside on the ground of misrepresentation, fraud, undue influence, or breach of the [Fair Trading Act 1986](#);
- (c) where something said in the course of the settlement discussions is said to give rise to an estoppel;
- (d) where the exclusion of the evidence would act as a cloak for perjury, blackmail or other serious impropriety;
- (e) to explain delay or apparent acquiescence;
- (f) where there is an issue as to whether the party has acted reasonably to mitigate loss;

4. *Martinsen v Target International (NZ) Ltd* [2019] NZEmpC 89 at [14]- [16]; *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80.

5 [Evidence Amendment Act 2016](#) Commencement Order 2016, cl 2.

6. *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [24]- [27].

- (g) where an offer has been made without prejudice save as to costs;
- (h) where rectification is sought in respect of a settlement agreement; and
- (i) an interpretation exception relating to "objective facts" which emerge during negotiations and which assist the Court to interpret a settlement agreement in accordance with the parties' true intentions.

[32] The cases that have applied [s 57\(3\)\(d\)](#) directly are similar in nature to those common law exceptions, generally involving issues around the alleged settlement itself.⁷

[33] This case does not fall within the same category of cases. While [s 57\(3\)\(d\)](#) is broad enough to go beyond the

settlement cases, I am not satisfied that the interests of justice require document SS.03286 to be disclosed.

[34] The challenge to the second defendant's objection to disclosure in respect of document SS.03286 fails. That document may be withheld.

Orders made

[35] In conclusion:

(a) Documents SS.02456 and SS.02457 are to be provided to the plaintiffs.

(b) The documents listed as privileged by the defendants that comprise amended versions of the TPT documents are to be provided in a redacted form to the plaintiffs, with any comments or notations made on them withheld.

(c) The documents over which public interest privilege had been sought that include details of Chinese witnesses who, it is said, have made disclosures on the condition of anonymity and confidentiality, are to be

7. See for example *Intelact Ltd v Fonterra TM Ltd* [2017] NZHC 1086; *Rapid Labels Ltd v Excel Digital Ltd* [2019] NZHC 2522 (this last one is obviously from before s 57(3)(d)).

disclosed to the plaintiffs with the identifying details of those witnesses redacted; unredacted copies of documents in this category are to be disclosed on a counsel-only basis and subject to undertakings to maintain the confidentiality of the witnesses' identity.

(d) Documents SS.03102 and SS.03105 are to be provided to the plaintiffs.

(e) Document SS.03286 may be withheld.

(f) The disclosure of documents (including in redacted form where noted), and of the unredacted documents agreed to be provided on a counsel only basis is to be made by the defendants within 10 working days.

(g) In relation to the documents provided on a counsel only basis, leave is reserved to the plaintiffs to apply within 10 working days of receipt of the documents for further orders should the need arise to use the documents to: (i) take instructions; (ii) brief lay or expert witnesses; or

(iii) otherwise for the purpose of this litigation.

[36] Costs are reserved.

J C Holden Judge

Judgment signed at 10.30 am on 19 December 2022

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